No. 3804

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF ITALY (a corporation),
Plaintiff in Error,

vs.

F. ROMEO & CO., INC. (a corporation),
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

LOUIS FERRARI,
Attorney for Plaintiff in Error.

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The defendant in error states in its brief that it has been considerably embarrassed by reason of the informality in which the plaintiff in error has proceeded with reference to this writ of error. The fact, however, that the defendant in error has devoted such a large portion of its brief to technical objections against the consideration of the substantial points which we have made, would lead to the conclusion that the chief embarrassment of the defendant in error has been to make a logical answer to the claims for reversal we have set forth in our opening brief. In this brief, however, we intend simply to answer said technical objections as we

feel that a complete answer to any other points made on the writ of error will be found in our opening brief.

RULE 24.

Defendant in error further states that it is embarrassed because plaintiff in error did not comply with Rule 24 of this Court in that no precise abstract or statement of the case, or a specification of the errors relied upon is found in our brief. We answer this claim by calling the attention of the Court to the language of Rule 24, as follows:

> "The brief shall contain a concise abstract or statement of the case presenting succinctly the questions involved in the manner in which they are raised."

In the instant case the question involved was presented very pointedly by the pleadings and by the phases into which the lower Court divided said question. We, therefore, in our brief, showed the issue involved as presented by the pleadings and the phases into which the same was divided. We submit and we feel that in doing so we succinctly stated the questions involved and fully complied with said rule. We did not feel we had a right to burden this Court with a long summary of evidence and statements of facts which were unnecessary to be considered by the Court in determining the legal questions presented by the writ of error.

With reference to the second objection of the defendant in error, that we have failed to specify

in our brief the points relied upon, we submit that under appropriate headings we have separately and distinctly set forth the specifications upon which we relied and the facts and arguments in support thereof.

FAILURE TO EXCEPT TO VERDICT.

The defendant in error further makes the point that the plaintiff in error is not entitled to have the question as to whether or not the evidence was sufficient to submit the case to the jury heard, first, because no objection was taken to the verdict, second, no motion was made for a directed verdict and, third, because the assignment of errors did not set forth the particulars in which the evidence was insufficient.

As to the first point, we refer to pages 35, 36 and the first paragraph on page 37 of our brief and submit that the stipulation in question covered the objection to the verdict as well as any other objection necessary to be taken during the trial, as the verdict was a ruling adverse to the plaintiff.

We note that the defendant in error objects to our use of the stipulation found on page 35 of our brief. There is no denial on the part of the defendant in error that the stipulation was entered into and there is not a suggestion that the reporter's transcript, from which said stipulation is taken, is incorrect in any respect. The stipulation, moreover, is in substance repeated in the bill of excep-

tions in the opinion of the trial Court found on page 124 of the transcript. For our purposes it makes absolutely no difference whether this Court takes the stipulation from the reporter's notes or from the opinion of the trial judge on the motion for a new trial. The substance is the same in both.

As to the second point, the questions involving the insufficiency of the evidence are reviewable notwithstanding that no motion was made for a directed verdict by reason of the fact that the Court undertook not only to instruct as to the law, but on the facts and, therefore, if there was no evidence in the record sustaining the contention of the defendant, the Court erred in instructing the jury as to the matters of fact which they could consider in weighing the evidence in favor of the defendant (see page 21, last paragraph, plaintiff's brief).

The claim that the consideration of this point on appeal would be unjust to the trial Court by reason of the fact that the insufficiency of the evidence was not called to the attention of the trial Court loses all its weight in this case by reason of the fact that a motion for a new trial was made in this case and the insufficiency of the evidence to sustain the judgment was called to the attention of the trial Court and the trial Court had as good (if not a better) opportunity to pass on said point than if the motion to advise the jury to acquit had been made at the conclusion of the case.

With reference to the alleged defect in the assignment of errors, it is pointed out that Assignment

No. 16 (Tr. folio 106, page 135) referred to the error of the Court in denying the motion of the plaintiff for a new trial and the transcript contains the petition for a motion for a new trial which sets forth the insufficiency of the evidence with extreme particularity (Tr. pages 16-17) and it would have served no useful purpose to have had said specifications repeated in the assignment of errors. It, therefore, appears that this contention is devoid of substantial merit and is purely a technical objection.

CONSIDERATION OF INSTRUCTIONS.

An answer to the objection of the defendant in error to the consideration of this Court of the instructions of the trial Court is found on pages 34, 35, 36 and the first paragraph of 37 of our opening brief.

PLAIN ERROR.

But even if the technical objections of this defendant in error are well founded in a case as we have shown where no substantial injury has been done to either the trial Court or the opposing counsel by the failure of the appellant to observe the technical requirements complained of, this Court will in the interests of justice, notice a plain error even where the same has not been excepted to or assigned.

Subdivision IV, Rule 24:

> "Errors not specified according to this rule, but the Court at its option, may notice a plain error not assigned or specified."

McBride v. Neal, 214 Fed. Rep. 966 (7th Circuit), from which we quote at page 969:

> "An assignment of errors is the pleading of the party seeking a reversal; and this court is always disposed to disregard any technical questions regarding the form or sufficiency of such a pleading, if it can be deemed sufficient to apprise the adversary of the grounds of reversal that are intended to be presented to the court; and we are also always disposed to note a substantial error which has been entered into the judgment, whether it has been properly assigned or not, and even if there is no assignment."

Central Improvement Co. v. Cambria Steel Co. et al., Guardian Trust Co. v. same, 201 Fed. Rep. page 811, reading from page 818:

> "And under rule 11 of this court a plain error not assigned may be, and ought to be, considered where the failure to consider it would result in a great injustice. United States v. Bernays, 158 Fed. 792; New York Life Ins. Co. v. Rankin, 162 Fed. 103; United States v. Tennessee, etc. R. R. Co., 176 U. S. 242. And in view of the facts that the issue here has been long and persistently contested below, that exception was taken and assignment of error made regarding it, *though upon an erroneous ground,* that both parties have prepared exhaustive briefs upon the question which the Trust Company asks us to review, that neither party can be taken by surprise, and that a failure to review the legal conclusion below

> would result in an unjust final adjudication of the issue under consideration, we are constrained to consider and decide it."

Pennsylvania Co. v. Sheeley, 221 Fed. Rep. page 901, reading from page 906:

> "However, there is one matter which must be considered 'plain error', so that it is our duty, under rule 11, to notice it without sufficient exception or assignment. The case was tried some months before the Supreme Court in Norfolk Co. v. Earnest, 229 U. S. 114, had formulated the rule of damages in cases of contributory negligence, and while the rule, as given by the court below to the jury, was in some respects more favorable to the defendant than it should have been, yet, upon the subject of proportioning damages, it can at least be said that the jury could not well have understood the rule to be as the Supreme Court has said it is; and it seems probable that the jury did not make allowance for contributory negligence as the statute requires. There must, therefore, be another trial, unless this error can be cured by a remittitur."

It will therefore be seen from the foregoing citations that the growing tendency of courts of appeal is to disregard the technical objections to a consideration of points when said points appear in the record and involve the substantial rights of the parties. In this case, as we have seen, no one has been taken by surprise, no one has lost any rights, the points in question are fully argued and presented in the briefs of the parties and substantial justice will only be done by a consideration of the merits of the points made by appellant for reversal and it

is therefore respectfully submitted that the technical objections made by the defendant in error to the consideration of the insufficiency of the evidence and a review of the instructions of the Court should be overruled and that the writ of error sued out by the plaintiff in error should be decided on its merits.

Dated, San Francisco,
March 20, 1922.

Respectfully submitted,

LOUIS FERRARI,

Attorney for Plaintiff in Error.